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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 12 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21, and 25)
of the Commission's Rules to Redesignate)
the 27.5-29.5 GHz Frequency Band, to)
Reallocate the 29.5-30.0 GHz Frequency Band,)
to Establish Rules and Policies for Local)
Multipoint Distribution Service and for)
Fixed Satellite Services)

CC Docket. No. 92-297

**REPLY OF WEBCEL COMMUNICATIONS, INC. IN
OPPOSITION TO PETITION FOR RECONSIDERATION**

WebCel Communications, Inc. ("WebCel"), by its attorney, hereby submits this reply in opposition to the petition of Microwave Services, Inc. and Digital Services Corp. for reconsideration of the band plan adopted in the First Report and Order (the "28 GHz Decision") in the above-captioned proceeding.¹

INTRODUCTION

WebCel is one of several dozen parties that have actively participated in this proceeding to help the Commission craft a carefully balanced band plan for 28 GHz fixed satellite services and Local Multipoint Distribution Services ("LMDS"). Through a prolonged and painful negotiating process, the Commission was able to fashion a plan that accommodates all those

¹ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, First Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 92-297, ¶¶ 105-36 (released July 22, 1996) ("28 GHz Decision").

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seeking to use frequencies in the 28 GHz band. That rulemaking proceeding took almost four years to complete, and in the interim the many private LMDS and satellite parties who participated in this proceeding—a group in which Microwave Services, Inc. and Digital Services Corp. (collectively, “MSI/DSC”) did not see fit to include themselves—were unable to even begin to implement business plans for the spectrum. While the parties to this rulemaking suffered delay as they and the Commission struggled to devise an acceptable band plan, MSI/DSC was able to quietly accumulate authorizations in what had been a moribund Digital Electronic Message Service (“DEMS”).

MSI/DSC has now requested that the Commission reconsider portions of the band plan for 28 GHz. Teledesic Corporation (“Teledesic”) has opposed MSI/DSC’s petition, based in part upon (1) MSI/DSC’s bypassing this proceeding while accumulating DEMS licenses, and (2) the Commission’s announced intention to conduct a comprehensive rulemaking on the future of DEMS in the 18 GHz band. WebCel supports Teledesic’s opposition to reconsideration of the *28 GHz Decision*.

WebCel intends to provide service in the 1.3 GHz portion of the 28 GHz band allocated to LMDS. LMDS offers enormous potential to provide a wealth of innovative services, including much-needed competition with local exchange carriers and cable systems. Reopening the carefully crafted accommodations embodied in the band plan would needlessly further delay the introduction of a range of procompetitive and pro-consumer services that have already endured a protracted rulemaking proceeding. While reconsideration would result in an unsettled band plan and stymie use of the 28 GHz band, MSI/DSC would be free to build out its system which—as

most recently described—appears somewhat similar to LMDS and other wireless services.

MSI/DSC's request is unjustified.

DISCUSSION

MSI/DSC has requested reconsideration of that portion of the *28 GHz Decision* which designates the 18.8-19.3 GHz band for the non-geostationary fixed satellite service, in order to allow an opportunity to consider spectrum sharing issues with DEMS systems. Although, as discussed below, WebCel very much favors reconsideration of the use of DEMS spectrum, such reconsideration *in this proceeding* is wholly unwarranted. Simply put, even if the Commission found that there is a need to rethink the use of the fixed satellite frequencies, there is no reason for further delaying auction and productive implementation of LMDS in the 28 GHz range. Resolution of the sharing issue on which MSI/DSC suggests reconsideration—no matter what form such resolution takes—has absolutely no impact on the spectrum already allocated and proposed to be allocated for LMDS. WebCel and others interested in implementing LMDS systems should not be held hostage by a delay wholly unrelated to their business plans that has been proposed by a firm which (as discussed further below) hopes to get an unfair jump on providing an LMDS-like service.

This is all the more true given that the Commission has already announced its intention to conduct a comprehensive rulemaking about the future of DEMS in the 18 GHz band which will include the sharing issue identified by MSI/DSC.² The time necessary to reach the *28 GHz Decision* has already afforded MSI/DSC a head start in accumulating licenses, which it has done in

² *Freeze on the Filing of Applications for New Licenses, Amendments and Modifications in the 18.8-19.3 GHz Band*, DA 96-1481 (released Aug. 30, 1996).

over 30 metropolitan areas. During that same period, potential LMDS providers in the United States have lost valuable time as at least seven other countries (including Canada and Mexico) have licensed LMDS systems.³ There is no reason to hand MSI/DSC an opportunity to use the reopening of this proceeding as a wedge to delay the introduction in this country of new 28 GHz services such as LMDS. The public interest in bringing innovative new broadband services like LMDS to American consumers in a timely manner is best served not by reopening this proceeding, but rather by *finalizing* it and assigning licenses in accordance with the painstakingly crafted *28 GHz Decision*.

The Commission's upcoming proceeding to reassess use of the 18 GHz band provides a much more appropriate forum for addressing the issues raised by MSI/DSC. Rather than affording piecemeal review to a single, now *ex post facto*, issue in the instant proceeding, the more plenary review of DEMS service will allow the Commission greater flexibility in resolving sharing and other issues that have been raised with respect to the 18 GHz band. For example, in assessing the sharing issue raised by MSI/DSC for reconsideration in this proceeding, the Commission would not be able to consider essential threshold issues, such as whether there is any longer a need for a DEMS service and/or whether that service should be moved to a different set of frequencies. By contrast, these would and should be issues of utmost importance in the impending 18 GHz proceeding, and resolution of either issue could also resolve the sharing issue raised by MSI/DSC. Thus, not only is there no reason to delay implementation of LMDS by reconsidering the band plan aspects of the *28 GHz Decision*, but there is also a far more suitable

³ See *28 GHz Decision* ¶ 16.

vehicle for addressing the concerns raised by MSI/DSC. Rather than delaying the 28 GHz proceeding, the Commission should expedite initiation of the 18 GHz proceeding.

Prompt initiation of an 18 GHz proceeding will afford the Commission an opportunity to reassess the DEMS service as conceived by its current proponents, such as MSI/DSC. As originally authorized by the Commission, DEMS was to be a narrowband, low-power service that would be provided by multiple licensees in a community each using pairs of 2.5 MHz or 5 MHz channels.⁴ Within these limitations, the service was intended to provide wireless data exchange and teleconferencing capabilities.⁵ Although in 1987 the Commission increased the bandwidth of the available channel pairs to 10 MHz each,⁶ even today the service has been allocated a maximum of only 200 MHz of spectrum.⁷ Despite these significant limitations, MSI/DSC proposes to offer high-speed, broadband digital services including “voice, high-speed data, and video based applications,” with applications including “desktop videoconferencing, telecommuting, virtual workgroups, distance learning, telemedicine, and multimedia-based information services.”⁸ This “new DEMS” service sounds suspiciously like a scaled-down version of

⁴ See *Amendment of Parts 2, 21, 87, and 90 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, the Use of Radio in digital Termination Systems for the Provision of Digital Communications Services*, 86 F.C.C.2d 360 (1981).

⁵ See, e.g., *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1215 (D.C. Cir. 1984) (DEMS “was designed primarily to meet the need of business and government organizations for electronic document distribution, computer data transfer, and teleconferencing services”); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, 98 F.C.C.2d 1191, 1205 (1984) (Commission had “anticipated that DEMS systems would be used for document distribution, data communications, and teleconferencing”); *First Report*, 86 F.C.C.2d at 384 (“even with a liberal assumption about the bandwidth needed for voice transmission, the spectrum allocated in this Order could support only a small fraction of voice demand”).

⁶ *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd. 5713, 5724-25 (1987).

⁷ See 47 C.F.R. §§ 101.101, 101.147(r)(9), 101.505. In fact, only 100 MHz of spectrum is available to common carrier and private carrier DEMS applicants that filed prior to August 1, 1996, and the combined 200 MHz available thereafter has been frozen.

⁸ Application for a New or Modified Microwave Radio Station License, filed by DMT, L.L.C. (dated June 5, 1996) at Exhibit M, pp. 1-2.

LMDS⁹ and is similar to some limited point-to-point services offered in the 38 GHz band. In fact, MSI/DSC has publicly recognized that its DEMS service “will compete with those offered by . . . other wireless carriers, including Local Multipoint Distribution Services (‘LMDS’), 38 GHz, and point-to-point microwave operators.”¹⁰

Given that the Commission is about to allocate 1,300 MHz of spectrum to LMDS and eventually additional spectrum to 38 GHz operators in orderly auction and licensing proceedings,¹¹ *at a minimum* it is questionable whether the public interest is well served by allowing “new DEMS” operators to use an additional 200 MHz of spectrum to provide a similar service. *If the Commission determines that DEMS should be reconfigured to accommodate the type of “new DEMS” service envisioned by MSI/DSC, WebCel believes that the Commission should also reopen the filing window so that all operators interested in providing such a service will have a fair opportunity to acquire this spectrum.*

To do otherwise would be to unfairly reward MSI/DSC for acquiring free licenses, that it intends to use for a new service not originally authorized by the Commission, to compete with providers who are required to pay for their spectrum licenses at auction.¹² While simple equity dictates such an analysis, reconsideration of the *28 GHz Decision* does not offer the Commission

⁹ The Commission has recognized that LMDS is capable of providing a number of innovative broadband services including voice, two-way video, teleconferencing, telemedicine, telecommuting, data services, and distance learning. *28 GHz Decision* ¶ 15.

¹⁰ See Securities and Exchange Commission Form 10-K, filed by The Associated Group, Inc. for the fiscal year ended December 31, 1995, SEC File No. 0-24924, at p. 3.

¹¹ *28 GHz Decision* ¶¶ 45, 95; *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, FCC 95-500 at 7-8 (released Dec. 15, 1995).

¹² For example, the Commission's Rules limit a DEMS applicant to one pair of channels at a time in a given market; application for additional channels is permissible only once the applicant is operating its previously authorized service at or near expected capacity and the service to be provided will fully utilize all spectrum requested. See 47 C.F.R. § 21.502(a)-(b). Instead, MSI/DSC applied for and received *multiple* channel pairs on its initial applications in at least 24 markets, apparently in order to acquire in one fell swoop sufficient spectrum to provide the LMDS-like broadband service it has proposed.

an appropriate vehicle for undertaking it. Accordingly, the Commission should dismiss MSI/DSC's petition for reconsideration and instead move expeditiously to resolve MSI/DSC's purported sharing concerns in the more appropriate context of the announced 18 GHz proceeding.

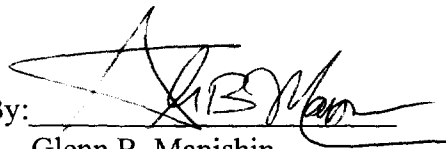
CONCLUSION

There is no reason for the Commission to further delay implementation of new and innovative services by reconsidering the *28 GHz Decision*. The issues raised by MSI/DSC can more appropriately be considered in the Commission's overall review of spectrum use in the 18 GHz range in which MSI/DSC is licensed to operate. It is high time that the Commission finalizes its band plan for use of the 28 GHz band and set loose the competitive forces that are poised to make broadband use of the spectrum and provide American consumers a host of much-needed wireless services.

Respectfully submitted,

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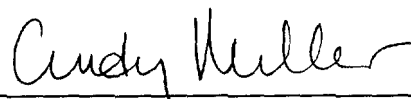
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Dated: December 12, 1996

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